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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. [redacted] 1357

ROBERT G. ERRINGTON,
Appellant,

vs.

THE STATE OF MISSOURI,
Respondent.

APPEAL FROM THE SUPREME COURT OF MISSOURI, EN BANC.

JURISDICTIONAL STATEMENT.

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APPEAL FROM THE SUPREME COURT OF MISSOURI, EN BANC.

JURISDICTIONAL STATEMENT.

STATEMENT AS TO JURISDICTION.

Appellant appeals from a judgment of the Supreme Court of Missouri, *en Banc*, entered on March 12, 1962, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial Federal question is present.

(a) OPINION BELOW.

The opinion of the Supreme Court of Missouri, *en Banc* (Appendix, *infra*, pp. A9-A21), is reported in 355 S.W.2d 952.

(b) STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

(i) This was a criminal prosecution under a substitute information in lieu of indictment brought in the Circuit Court of Jackson County, Missouri, at Kansas City, charging defendant with practicing medicine without a license in violation of Section 334.030, R.S. Mo. 1949, a misdemeanor.

(ii) Upon trial in a jury waived case the court entered a judgment of conviction on June 2, 1960 (Tr. 124). A timely Motion for a New Trial was filed (Tr. 125) and was overruled on June 16, 1960 (Tr. 129, 136). An appeal was taken to the Supreme Court of Missouri (Tr. 137). The opinion and judgment of the Supreme Court of Missouri, *en Banc*, adverse to appellant was entered on March 12, 1962. Appellant filed a timely motion for rehearing which was overruled on April 9, 1962. Notice of appeal to the Supreme Court of the United States was timely filed with the Supreme Court of Missouri on May 22, 1962 (Appendix pp. A27-A30).

(iii) The jurisdiction of the Supreme Court of the United States to review this decision is conferred by 28 U.S.C. 1257 (2). There was drawn in question the validity of Section 334.030, R.S. Mo. 1949, on the ground of its being repugnant to the Due Process and Equal Protection

Clauses of the Fourteenth Amendment to the Constitution of the United States. The decision of the Supreme Court of Missouri was in favor of its validity.

(iv) The following decisions are believed to sustain the jurisdiction of this Court to review the judgment of the Supreme Court of Missouri on the ground there was drawn in question the validity of a statute of the State of Missouri on the ground it was repugnant to the Constitution of the United States and the decision of the Supreme Court of Missouri was in favor of its validity (28 U.S.C. 1257 (2)).

Crane v. *Johnson*, 242 U.S. 339, 37 S. Ct. 176, 61 L. Ed. 348.

Truax v. *Raich*, 239 U.S. 33, 36 S. Ct. 7.

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Hawk v. *Olson*, 326 U.S. 271, 276, 66 S. Ct. 116, 119.

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Poulos v. *State of New Hampshire*, 345 U.S. 395, 403, 73 S. Ct. 760, 765.

Schware v. *Board of Bar Exam. of State of N. M.*, 353 U.S. 232, 238, 77 S. Ct. 752, 756.

(v) The relevant provisions of Section 334.030, R.S. Mo. 1949, are as follows:

"334.030 **Practice of medicine without license prohibited—forgery of license—penalties.**

1. Any person practicing medicine or surgery in this state, and any person attempting to treat the sick or others afflicted with bodily or mental infirmities, and any person representing or advertising him-

self by any means or through any medium whatsoever, or in any manner whatsoever, so as to indicate that he is authorized to or does practice medicine or surgery in this state, or that he is authorized to or does treat the sick or other afflicted with bodily or mental infirmities, without a license from the state board of medical examiners shall, upon conviction, be adjudged guilty of a misdemeanor for each and every offense; and treating each patient shall be regarded as a separate offense; provided, that physicians registered on or prior to March 1, 1901, shall be regarded for every purpose herein as licensees and registered physicians under the provisions of this law."

(c) THE QUESTIONS PRESENTED BY THIS APPEAL.

1. Can the Supreme Court of Missouri by construction of Section 334.030, R.S. Missouri of the State's Medical Practice Act, deprive appellant of his constitutional rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States to practice his profession as a naturopathic physician by broadening the scope of the statute to include naturopathy within its provisions and requirements, although the practice of naturopathy was permitted at the common law and is not now prohibited in Missouri?

2. Does the opinion and judgment of the Supreme Court of Missouri herein have the practical effect of suppressing naturopathy and prohibiting appellant and other naturopathic physicians from practicing naturopathy in Missouri without any showing it is detrimental to the public or inherently harmful, and is therefore arbitrary, unreasonable and discriminatory so as to deprive him of his right to Due Process and Equal Protection under Section 1 of the Fourteenth Amendment to the Constitution of the United States?

3. Does the opinion and judgment of the Supreme Court of Missouri herein deprive appellant and other naturopathic physicians in Missouri of that Due Process and Equal Protection of the Law guaranteed them by Section 1 of the Fourteenth Amendment to the Constitution of the United States by the arbitrary, unreasonable and discriminatory requirement that they study and pass examinations in non-naturopathic subjects?

4. Do Sections 334.030, 334.120 and 334.040, R.S. Mo. 1949, as construed and applied by the Supreme Court of Missouri in its opinion and judgment herein unfairly discriminate against naturopathic physicians by conferring exclusive jurisdiction over them on their medical competitors, and thereby deprive them of their liberty, personal and property rights without due process of law, and denies them the equal protection of law in violation of their rights guaranteed by Section 1, of the Fourteenth Amendment to the Constitution of the United States?

5. Does the opinion and judgment of the Supreme Court of Missouri in construing Section 334.030, R.S. Mo. 1949, as singling out appellant and other doctors of naturopathy and denying them the right to practice the healing art in accordance with the teachings of their profession as naturopaths (although permitted at common law and not now prohibited in Missouri) render said statute arbitrary, capricious, discriminatory, unconstitutional and void as denying them Due Process of Law and Equal Protection of Law in violation of their rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States?

(d) STATEMENT OF FACTS.

This was a criminal prosecution under a substitute Information in lieu of Indictment brought in the Circuit Court of Jackson County, Missouri, charging this appellant, as defendant, with practicing medicine without a license in violation of Section 334.030 R.S. Mo. 1949, a misdemeanor (Tr. 5, 6; 355 S.W.2d, l.c. 953).

Appellant is a Doctor of Naturopathy and has been such since 1927 (Tr. 17). He had practiced naturopathy in Kansas City since 1943 at the time of the trial herein on May 16, 1960 (Tr. 17, 50).

Appellant had no license to practice in Missouri as there was no provision in law for obtaining such a license by members of his school of the healing art (Tr. 57, 58, 61-66).

The essential facts were stated by the Missouri Supreme Court as follows (355 S.W.2d, l.c. 954-955):

> "Appellant maintained an office at 100 East 63rd Street, Kansas City, Missouri. He was listed in the 'yellow pages' of the Kansas City telephone directory as follows: 'Conservatory of Health, Dr. Robert G. Errington, Naturopathic Physician, Jackson 3-9201.' On May 26, 1959, Ethel Wales Strunk called in person at appellant's office because, as she said, her condition was 'run down.' After appellant talked to her he told her that 'it sounded like' she was anemic and run down,' that there was 'probably something else wrong, perhaps gallstones,' that he had a series of 18 treatments which 'would get rid of them' and that the cost would be '$178.00 plus vitamins.' Miss Strunk gave appellant a check for 'the down payment' in the amount of $50 and was told to return on the following Friday morning, May 29, to receive a 'dose of medicine.' At that time appellant and his wife, re-

ferred to as his nurse, gave Miss Strunk 'a glass full of medicine' which was 'sort of pinkish-white.' Miss Strunk testified that appellant said it was 'a mild laxative' and 'clean me out before they gave me the other dose of medicine.' That evening, after she arrived home, she was 'sort of sick' at her stomach and she felt as though she had taken 'quite a laxative.' By pre-arrangement appellant's nurse went home with Miss Strunk, and the nurse gave her 'a glass of sort of yellowish, oily substance to drink.' About midnight she became 'real sick' and vomited a 'greenish substance.' She was too sick to go to work on the following Monday and Tuesday. On June 2, 1959, she returned to appellant's office. She was placed on a 'sort of vibration table,' was given 'hot and cold baths in a big tub,' and was placed in front of a series of sun lamps. Appellant then came in and gave her an 'adjustment.' He 'popped [her] neck and back,' which was 'supposed to help * * * circulation.' Miss Strunk testified that at this time appellant 'assumed' that she had gotten rid of the gallstones by reason of the previous treatment.

Miss Strunk asked appellant if he 'studied to get his degree like most other licensed physicians do,' and he replied that he did and that he was a licensed doctor. She and appellant then discussed 'vitamins [she] would have to have.' Appellant gave her 'calcium powder' out of a gallon can for which she paid him $10.50. On June 9 she returned to appellant's office and 'went through the series of treatments of the hot and cold baths and the adjustment again.' At this time appellant gave her four bottles of vitamins, 'it was A, C, D, and E,' which he said would 'help build [her] up,' but at the time her condition 'had gotten worse.' For these vitamins Miss Strunk paid appellant $44.60.

On June 16 and again on June 23 Miss Strunk received another 'series of treatments.' On June 16 appellant gave her another bottle of vitamins, "B-

Complex, he called them' for which she paid $12.20. By this time Miss Strunk 'was wondering about him' and also about the price of the vitamins. He 'mentioned he had to have a special license to administer vitamins in less than 100, because the bottles were sealed,' but the bottle he had given Miss Strunk had not been sealed. She discussed this with him but he 'really didn't have an explanation for the fact the bottles weren't sealed.'

Miss Strunk received no further treatments from appellant, but she returned on July 1, 1959, to have him fill out an insurance form. Appellant filled in the answers on a 'physician's Statement.' In answer to the question 'Your diagnosis,' he wrote in the word 'Choledochitis.' He also made check marks to show that her condition was due to illness and not an accident and that the illness was a 'primary condition.' He wrote the word 'Indigestion' in answer to the question, 'What other disease is it secondary to, complicated with, or a sequence of.' In answer to the question, 'Dates you treated patient for this condition' he wrote 'May 26' for treatment 'at office' and he wrote 'May 27-28-29-30, June 1-2-3-16, 23-30' for treatments 'At home.' He made a check mark indicating that the 'patient [had no] chronic or constitutional disease, physical defect or deformity.' The form had a place for signature as follows: 'Signed _____ M.D'. Here appellant wrote 'Dr. Robert G. Errington,' and without marking out the printed letters 'M.D.' he wrote over them what appears to be 'N.D.'"

Following a jury waived trial the Court on June 2, 1960, found appellant guilty as charged and assessed his punishment at a fine of One Thousand Dollars ($1,000.00) and a sentence of imprisonment in the county jail for a term of one year (Tr. 124).

On June 9, 1960, appellant timely filed his motion for new trial (Tr. 125-129) which the Court overruled on

June 16, 1960 (Tr. 129, 136-137). On June 16, 1960, appellant filed timely notice of appeal to the Supreme Court of Missouri, and posted his supersedeas bond (Tr. 137).

The Supreme Court of Missouri, *en banc*, filed an opinion and entered a final judgment holding this statute constitutional and valid (Appendix pp. A9-A21).

MANNER OF RAISING FEDERAL CONSTITUTIONAL QUESTIONS.

We submit the recital hereinafter as to the record on the Federal Constitutional issues demonstrates that the Constitutional questions were raised at the first opportunity and kept alive at all stages of the proceedings.

However we believe that is not a live question at this time as the Supreme Court of Missouri specifically based its jurisdiction on the fact it was called upon to decide Constitutional issues (355 S.W.2d, l.c. 953-954). The Missouri Supreme Court then ruled the Constitutional questions adversely to this appellant and in favor of the validity of the State Statute. (355 S.W.2d, l.c. 957-958).

In the case of *Charleston Federal S. & L. Ass'n* v. *Alderson*, 324 U.S. 182, 185-186, 65 S. Ct. 624, the Court said (l.c. 627):

> "[3-5] Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the
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> question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court. Manhattan Life Ins.

Co. v. Cohen, 234 U.S. 123, 134, 34 S. Ct. 874, 877, 58 L. Ed. 1245; Chicago, R. I. & P. R. Co. v. Perry, 259 U.S. 548, 551, 42 S. Ct. 524, 525, 66 L. Ed. 1056; Saltonstall v. Saltonstall, 276 U.S. 260, 267, 48 S. Ct. 225, 72 L. Ed 565; Home Ins. Co. v. Dick. 281 U.S. 397, 407, 50 S. Ct. 338, 341, 74 L. Ed 926, 74 A.L.R. 701; Nickey v. Mississippi, 292 U.S. 393, 394, 54 S. Ct. 743, 78 L. Ed. 1323; Whitfield v. Ohio, 297 U.S. 431, 435, 436, 56 S. Ct. 532, 533, 80 L. Ed. 778."

In the case of *Raley* v. *State of Ohio*, 360 U.S. 423, 436, 79 S. Ct. 1257, the Court said (l.c. 1265):

> "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it. See Manhattan Life Ins. Co. of New York v. Cohen, 234 U.S. 123, 134, 34 S. Ct. 874, 877, 58 L. Ed, 1245."

On December 29, 1959, and prior to the trial in the Jackson County Circuit Court appellant filed his motion to dismiss the Substitute Information in Lieu of Indictment (Tr. 12, 13) charging in substance:

That Section 334.030, R.S. Mo. 1949, was unconstitutional as being indefinite and vague in failing to define "practice of medicine"; that it deprived him of a property right without due process of law in violation of his rights under the 14th Amendment to the Constitution of the United States; that it was unconstitutional in that it granted exclusive individual rights and privileges to those persons only authorized under the statute and therefore became class legislation (Tr. 12, 13).

Appellant's motions to inspect grand jury notes and to dismiss the Substitute Information was orally argued (Tr. 28-48).

In the course of such oral argument appellant's counsel argued that the Statute was unconstitutional for indefinite-

ness (Tr. 37-38, 39, 40); deprived him of a property right without due process of law in violation of the 14th Amendment to the Constitution of the United States (Tr. 38, 40); and that it was unconstitutional as granting exclusive rights and privileges to those persons only authorized under the statute (Tr. 40).

The prosecuting attorney then argued the State's side of the constitutional questions (Tr. 41-44).

The Court overruled Appellant's motion to dismiss the Substitute Information thereby overruling and denying appellant's claims of violation of his constitutional rights (Tr. 49).

In his motion for new trial in the Circuit Court; assignments 6 (Tr. 126) 19 and 20 (Tr. 129) appellant again assigned violations of his rights under the United States Constitution and especially Section 1 of the Fourteenth Amendment to the Constitution of the United States (Tr. 129). The Court overruled appellant's said motion for new trial including his assignments as to the violation of his Constitutional rights (Tr. 136).

Point A and the principal other part of appellant's brief in the Supreme Court of Missouri, *en Banc*, was devoted to arguing the violations of appellant's rights under the Fourteenth Amendment to the Constitution of the United States (Appellant's Brief before Missouri Supreme Court, *en Banc*, pp. 10-21).

The Supreme Court of Missouri, *en Banc*, specifically considered, passed on and overruled appellant's assignments of violations of his constitutional rights (355 S.W. 2d, l.c. 954, 957, 958, Appendix pp. A19-A20).

Following the opinion of the Missouri Supreme Court, *en Banc*, appellant filed his Motion for Rehearing devoted

exclusively to assignments of claimed violations of his rights under the 14th Amendment to the Constitution of the United States (Tr. 179-181, Appendix pp. A22-A26). The Supreme Court of Missouri, *en Banc*, overruled said motion thereby overruling and denying appellant's assignments of violation of his constitutional rights (Tr. 182, Appendix p. A26).

Appellant is an alien lawfully residing in the United States (Tr. 27, 28). As such he is entitled to the protection of the Due Process and Equal Protection clauses of the Fourteenth Amendment.

In holding the due process clause of the Fourteenth Amendment protects an alien from state discriminatory legislation the Court in *Torao Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, 420, 68 S. Ct. 1138, said (l.c. 1143):

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."

In the case of *Galvan* v. *Press*, 347 U.S. 522, 530, 74 S. Ct. 737, the Court said (l.c. 742):

> "* * * since he is a 'person', an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, * * *."

(e) THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

This suit challenges State Statute, Section 334.030, R.S. Mo. 1949, as depriving appellant of the right to practice his profession as a naturopathic physician because not licensed by the State of Missouri in violation of his rights under the

Constitution of the United States when no provision is made in the laws of Missouri for licensing naturopathic physicians, although it is admitted the practice of naturopathy is permitted under the laws of Missouri, but only by licensed medical doctors. (355 S.W.2d, l.c. 957-958)

This suit involves personal and property rights and human liberties under the protection of the Federal Constitution and Laws, and such rights and liberties are always a proper subject for review by this Court.

In the case of *Shelley* v. *Kraemer*, 334 U.S. 1, 20, 68 S. Ct. 836, the Court said (l.c. 845):

> "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands."

In the case of *Wheeling Steel Corporation* v. *Glander*, 337 U.S. 562, 570, 69 S. Ct. 1291, the Court said (l.c. 1296):

> "The State action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation."

The right to follow and practice a legitimate profession is a personal right and a property right, and is one of the fundamental rights guaranteed by the Constitution of the United States. A person's business, profession or occupation is properly within the meaning and intent of the Constitutional provision of the 14th Amendment to the Constitution of the United States requiring due process of law and equal protection of the law, and is included within the right to liberty and the pursuit of happiness. *Adam* v. *Tanner*, 244 U.S. 590, 37 S. Ct. 662, 665, 61 L. Ed. 1336;

Butcher's Union Slaughter-House Co. v. *Crescent City Stock Landing Co.*, 111 U.S. 746, 4 S. Ct. 652, 28 L. Ed. 585.

In a dissenting opinion, concurred in by Mr. Justice Black, Mr. Justice Douglas described that right in *Barsky* v. *Board of Regents of University*, 374 U.S. 442, 472, 74 St. Ct. 650, in the following eloquent words (l.c. 666):

> "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. The American ideal was stated by Emerson in his essay on *Politics*, 'A man has a right to be employed, to be trusted, to be loved, to be revered.' It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. For many it would be better to work in jail, than to sit idle on the curb. The great values of freedom are in the opportunities afforded man to press to new horizons, to pit his strength against the forces of nature, to match skills with his fellow man."

In the case of *Napue* v. *People of the State of Illinois*, 360 U.S. 264, 271, 79 S. Ct. 1173, the Court said (l.c. 1178):

> "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate. Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. Ed. 97; Cooper v. Aaron, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 5."

Appellant was here prosecuted and convicted of practising medicine without a license in violation of Section 334.010, R.S. Mo. 1949. He was a naturopathic physician who had practiced his profession as such for 33 years, all of them since 1943 in Kansas City. (Tr. 17).

He had no license to practice as Missouri laws contain no provisions for licensing naturopaths. (Tr. 62-64).

The Missouri legislature "has made provision for persons desiring to practice medicine in certain limited fields or to engage in related professions such as chiropodists (Chapter 330), chiropractors (Chapter 331), dentists (Chapter 332), nurses (Chapter 335), optometrists (Chapter 336), osteopaths (Chapter 337, now repealed), and pharmacists (Chapter 338)." *State* v. *Errington*, 355 S.W.2d, l.c. 957.

Under Missouri law the practice of naturopathy is permitted (*State* v. *Scopel*, Mo. Sup., 316 S.W.2d, 515, 519 (3), *State* v. *Errington*, Mo. Sup., 355 S.W.2d, l.c. 957, 958), but these cases hold that to obtain a license to practice naturopathy in Missouri an applicant has to graduate from an accredited medical college, pass an examination for medical doctors and obtain a license as a medical doctor. *State* v. *Errington*, Mo. Sup., 355 S.W.2d, l.c. 957.

To qualify for a license to practice in Missouri a naturopathic physician is required to study and take and pass an examination before the State Board of Medical Examiners, constituted entirely of medical doctors (Section 334.120, R.S. Mo. 1949), including among others an examination in the subjects of surgery and practice of medicine (Section 334.040, R.S. Mo. 1949), which have no relation to the practice of naturopathy.

The evidence in this case fails to show that appellant at any time used or attempted to use any narcotic or poisonous drug requiring a special license, or engaged in surgery or in any other practice not strictly in conformity with the practice of naturopathy, defined by the Dictionary of Occupational Titles, U.S. Department of Labor, as follows:

> "DOCTOR, NATUROPATHIC (Medical Ser.) 0-52.21, naturopath. A HEALER, Diagnoses and treats patients to stimulate and restore natural bodily processes and functions using a system of practice that em-

ploys physical, mechanical, chemical, and psychological methods: Utilizes dietetics, exercise, manipulation, chemical substances naturally found in or produced by living bodies, and healing properties of air, light, water, heat, and electricity. Provides for care of bodily functions, processes or traumas, and treats nervous or muscular tension; abnormalities of tissues, organs, muscles, joints, bones, and skin; pressure on nerves, blood vessels, and lymphatics; and assists patients in making adjustments of a mental and emotional nature. Naturopathy excludes the use of major surgery, x-ray and radium for therapeutic purposes, and use of drugs with exception of those substances which are assimilable, contain elements or compounds which are components of bodily tissues, and are usable by body processes for maintenance of life."

The Supreme Court of Missouri took judicial notice of the meaning of the term "practice of medicine" as a matter of common knowledge (355 S.W.2d, l.c. 956), but declined to take judicial notice of the meaning of "naturopathy" (355 S.W.2d, l.c. 958), although naturopathy is an old established school of healing recognized by the common law. *State* v. *Borah*, 51 Ariz. 318, 76 P.2d 757, 115 A.L.R. 254.

Historically, naturopathy can trace its origin back to Hippocrates, in whose writings we find that great reliance was placed upon the "vis medicatrix naturae"—the healing power of matter—and the idea that nature heals, the physician assists. The non-medical branch of the healing art was authorized by statute prior to the American Revolution and came to us as a part of the common law (See Halsbury's Statutes of England, 1930, Vol. 11, page 643).

This opinion approves naturopathy, but only when practiced by a medical doctor (355 S.W.2d, l.c. 957-958). This requirement goes far beyond any legitimate bounds of regulation and puts such an impossible burden on natur-

opathy as to have the effect of suppressing naturopathy and prohibiting its practice without any showing of injury, or tendency to injury of the public health, safety or morals, but on the contrary approving it when practiced by a medical doctor.

The naturopathic system of healing is a limited field of healing and does not include major surgery, use of narcotics and poisonous drugs, or X-ray and radium equipment for therapeutic purposes.

It is appellant's contention that to require him and other naturopathic physicians to take a full medical course, including the above subjects not used in naturopathy at great expense in time and money in order to obtain a license entitling them to practice in the limited field of naturopathy constitutes an effective suppression of this legitimate and approved field of healing and prohibits appellant and other naturopaths from practicing their profession; that such requirements are arbitrary, unreasonable and oppressive requirements which contravene the Constitution and laws of the United States and amount to a denial of due process and equal protection of the laws under Section 1 of the Fourteenth Amendment to the Constitution of the United States. *England et al.* v. *Louisiana State Board of Medical Examiners et al.*, 5 Cir., 259 F.2d 626 (Cert. Denied 359 U.S. 1012, 79 S. Ct. 1149, 3 L. Ed. 2d 1036); 263 F.2d 661.

Since the practice of naturopathy is legitimate and approved by the State of Missouri (*State* v. *Errington*, Mo. Sup., 355 S.W.2d 952, 957-958; *State ex rel. Collett* v. *Scopel*, Mo. Sup., 316 S.W.2d 515, 519) it may not claim the practice of naturopathy will injure, or tend to injure the public health, safety or morals so as to justify its suppression and denial of appellant's constitutional right to practice his profession as a naturopathic physician.

In the case of *Oyama* v. *State of California*, 332 U.S. 633, 636, 68 S. Ct. 269, the Court said (l.c. 270):

> "[1] In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

Under the guise of reasonable regulation the State of Missouri for no justifiable reason discriminates against this system of healing and puts such onerous burdens on the practice of naturopathy as to suppress such system of treatment and prohibit its practice.

In the case of *Poulos* v. *State of New Hampshire*, 345 U.S. 395, 408, 73 S. Ct. 760, the Court said (l.c. 768):

> "Regulation and suppression are not the same, either in purpose or result, and courts of justice can tell the difference."

The Supreme Court of Missouri in this case stated the correct rule as follows *State* v. *Errington*, 355 S.W.2d, (l.c. 957):

> "'The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity.' If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.' See also Williams v. State of Arkansas, 217 U.S. 79, 30 S. Ct. 493, 54 L. Ed. 673; Watson v. State of Maryland, 218

U.S. 173, 30 S. Ct. 644, 54 L. Ed. 987; Hawker v. People of State of New York, 170 U.S. 189, 18 S. Ct. 573, 42 L. Ed. 1002; Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S. Ct. 570, 79 L. Ed. 1086."

The quotation in the Missouri Supreme Court opinion is from the leading case of *Dent* v. *State of West Virginia*, 129 U.S. 114, 32 L. Ed. 623, 9 S. Ct. 231.

The qualifications required here of naturopathic physicians to educate themselves through the regular course of the medical schools, study and take examinations in subjects foreign to the practice of naturopathy given by a board made up entirely of medical doctors makes qualification for a license to practice naturopathy "unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

1. DUE PROCESS OF LAW.

A. Appellant Is Deprived of Substantial Personal and Property Rights.

The fact this statute may appear to be fair on its face or on consideration of the rule a statute will not be held unconstitutional if it may be interpreted to avoid the constitutional question is inappropriate here. The Missouri Supreme Court has interpreted it in a manner necessarily controlling here. In the case of *Poulos* v. *State of New Hampshire*, 345 U.S. 395, 403, 73 S. Ct. 760, the Court said (l.c. 765):

> "While there was no assertion of the invalidity of the ordinance on its face, the Supreme Court determined the validity of the ordinance as applied. See Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 287, 42 S. Ct. 106, 107, 66 L. Ed. 239; Charleston

Federal Sav. & Loan Ass'n v. Alderson, 324 U.S. 182, 185-186, 65 S. Ct. 624, 627, 89 L. Ed. 857."

Appellant is a doctor of naturopathy and has been since 1927 (Tr. 17). He had practiced as a doctor of naturopathy in Kansas City since 1943, a period of approximately 17 years at the time of the trial herein on May 16, 1960 (Tr. 17, 50).

As pointed out under Point I, A, hereinafter the practice of naturopathy is not forbidden in Missouri but is held to be perfectly lawful and proper only if practiced by a person having a license as a medical doctor.

The right of appellant as a doctor of naturopathy to practice his profession is both a property right and a personal right guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

In the case of *Schware* v. *Board of Bar Exam. of State of N. M.*, 353 U.S. 232, 238-239, 77 S. Ct. 752, the Court said (l.c. 756):

> "[2-4] A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. Dent v. State of West Virginia, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623. Cf. Slochower v. Board of Higher Education, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692; Wieman v. Updegraff, 344 U.S. 183, 76 S. Ct. 215, 97 L. Ed. 216. And see Ex parte Secombe, 19 How. 9, 13, 15 L. Ed. 565."

The right to follow any of the common occupations is an inalienable right—a freedom and liberty protected by the Constitution of the United States. *Adams* v. *Tanner*, 244 U.S. 590, 61 L. Ed. 1336, 37 S. Ct. 662, 665; *Algeyer* v. *Louisiana*, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 832;

Homer v. *Richmond*, Ct. App. D.C., 292 F.2d 719, 722; *Butcher's Union Company* v. *Crescent City Company*, 111 U.S. 746, 4 S. Ct. 652, 28 L. Ed. 585; *Lawton* v. *Steele*, 152 U.S. 133, 137, 138, 14 S. Ct. 499, 38 L. Ed. 385.

It is also a property right. *Butcher's Union Company* v. *Crescent City Co.*, 111 U.S. 746, 4 S. Ct. 652, 28 L. Ed. 585; *Truax* v. *Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254; *Homer* v. *Richmond*, D.C. Ct. App., 292 F.2d 719, 722; *New State Ice Company* v. *Liebmann*, 285 U.S. 262, 278, 52 S. Ct. 371, 76 L. Ed. 747. In the latter case the the Court said (52 S. Ct. 374):

> "[2] Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' Burns Baking Co. v. Bryan, 264 U.S. 504, 513, 44 S. Ct. 412, 413, 68 L. Ed. 813, 32 A.L.R. 661, and authorities cited; Liggett Co. v. Baldridge, 278 U.S. 105, 113, 49 S. Ct. 57, 73 L. Ed. 204."

B. The Missouri State Statute Is Arbitrary and Unreasonable.

The Missouri Supreme Court in its opinion in this case quoted the correct rule from the opinion of this Court in the case of *Dent* v. *State of West Virginia*, 129 U.S. 114, 9 S. Ct. 231, 233, 32 L. Ed. 623, and followed by citing other supporting authorities of this Court for such rule.

The Missouri Supreme Court said herein (355 S.W.2d l.c. 957):

"'The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.' See also Williams v. State of Arkansas, 217 U.S. 79, 30 S. Ct. 493, 54 L. Ed. 673; Watson v. State of Maryland, 218 U.S. 173, 30 S. Ct. 644, 54 L. Ed. 987; Hawker v. People of State of New York, 170 U.S. 189, 18 S. Ct. 573, 42 L. Ed. 1002; Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S. Ct. 570, 79 L. Ed. 1086."

The correct application of that rule will clearly demonstrate the unsoundness and unconstitutionality of the State Statute in question.

To qualify for a license to practice in Missouri a naturopathic physician is required to study and take and pass an examination before the State Board of Medical Examiners, constituted entirely of medical doctors (Section 344.120, R.S. Mo. 1949), including among other subjects an examination in the subjects of surgery and practice of medicine (Section 334.040, R.S. Mo. 1949) which have no relation to the practice of naturopathy.

In addition to the subjects specified by the statute it is a matter of common knowledge that a medical college requires studies and examinations in the use of poisonous and narcotic drugs, and the use of X-rays and radium for therapeutic purposes to mention only a few of the medical subjects foreign to the practice of naturopathy.

The Missouri legislature has at no time expressly manifested its intent or policy that naturopathic subjects should be taught in the medical schools or included in the category of either Allopathic or Homeopathic medicine. No legislation has been enacted in the State of Missouri prohibiting the practice of naturopathy and the Supreme Court of Missouri has ruled that the practice of naturopathy is legitimate and permitted, but only if practiced by a medical doctor. *State* v. *Errington*, Mo. Sup., 355 S.W.2d 952, 957-958; *State ex rel. Collett* v. *Scopel*, Mo. Sup., 316 S.W.2d 515, 518-519 (3).

Since medical schools do not teach naturopathy, and naturopathic schools do not teach medicine, appellant and all others similarly situated who desire to continue in the practice of the profession of naturopathy, find it impossible to comply with the decision of the Missouri Supreme Court.

The Missouri Statute, as interpreted and enforced by the Courts of Missouri, is arbitrary, unreasonable and unfair in that it:

a. Authorizes a medical doctor to practice naturopathy, a science not included in the curricula of medical schools and concerning which he is, accordingly, untrained, while it forbids physicians skilled in this system of healing from practicing their learned profession.

b. Discriminates unfairly against naturopathics by giving the medical doctors exclusive authority and jurisdiction over their naturopathic competitors and gives medical doctors a monopoly of the practice of naturopathy in which they are without training.

c. In practical effect prohibits the practice of naturopathy under the guise of reasonable regulation al-

though recognizing it as a legitimate system of healing and proper to be practiced in Missouri, but only by medical doctors.

d. By arbitrarily and unreasonably interfering with the business or occupation of appellant and all other Missouri naturopaths similarly situated through the interposition of unreasonable, unnecessary and confiscatory regulations under the guise of protecting the public interest and health.

e. By unreasonably and oppressively requiring naturopaths to take the full medical school course, pass examinations in all medical courses and obtain licenses as medical doctors before being licensed to practice naturopathy.

In the case of *Hartford Steam Boiler I. & Ins. Co.* v. *Harrison*, 301 U.S. 459, 462, 57 S. Ct. 838, the Court stated the law as follows (l.c. 840):

> "'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision. Compare Martin v. District of Columbia, 205 U.S. 135, 139, 27 S. Ct. 440, 51 L. Ed. 743; Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232, 237, 10 S. Ct. 533, 33 L. Ed. 892.'"
>
> "[2, 3] Despite the broad range of the state's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture. Borden's Company v. Baldwin, 293 U.S. 194, 209, 55 S. Ct. 187, 191, 79 L. Ed. 281. They cannot stand as reasonable if they offend the plain standards of common sense."

In the case of *Smith* v. *Cahoon*, 282 U.S. 553, 566, 567, 51 S. Ct. 582, the Court said (l.c. 587):

"The point with respect to this discrimination is not that a distinction is made between common carriers and private carriers, but between private carriers themselves, although they are alike engaged in transporting property for compensation over public highways between fixed termini or over a regular route.

* * *

"But, in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary, and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.' Air-way Electric Appliance Corporation v. Day, 266 U.S. 71, 85, 45 S. Ct. 12, 15, 69 L. Ed. 169; Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 563, 564, 22 S. Ct. 431, 46 L. Ed. 679; Southern Railway Co. v. Greene, 216 U.S. 400, 417, 30 S. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247; Truax v. Corrigan, 257 U.S. 312, 332, 333, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375; Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 37, 48 S. Ct. 423, 72 L. Ed. 770."

2. EQUAL PROTECTION OF THE LAW.

The State of Missouri recognizes naturopathy as a legitimate system of healing in its limited field. *State* v. *Errington*, Mo. Sup., 355 S.W.2d 952, 957-958; *State ex rel. Collett* v. *Scopel*, Mo. Sup., 316 S.W.2d 515, 518-519(3).

The opinion of the Supreme Court of Missouri herein (355 S.W.2d l.c. 957) points out that the Missouri legislature has recognized and "made provision for persons desiring to practice medicine in certain limited fields or to engage in related professions" such as chiropractors, dentists, nurses, optometrists, osteopaths and pharmacists.

The State of Missouri has recognized naturopathy but has made no provision for those desiring to practice in this field. In so failing, we submit, the State has acted unreasonably, arbitrarily and in a discriminatory manner in violation of the United States Constitution.

Naturopathy is specifically recognized by name as an independent branch of the healing art and licensed in the following states of the United States:

ARIZONA. See Arizona Code Annotated (1939), Chapter 67, Professional and Business Pursuits, Article 12, *Naturopathy*, Sections 67-1201 through 67-1218 (Law adopted in 1935).

CONNECTICUT. See General Statutes of Connecticut (Revision of 1949), Title XXXII, Examining Boards, Chapter 210, *Naturopathy*, Sections 4388 through 4397 (Law adopted in 1923).

DISTRICT OF COLUMBIA. See District of Columbia Code (1951), Title 2, District Boards and Commissions, Chapter 1, Healing Arts Practice Act, Sections 2-106, 2-114 and 2-117 (Law adopted in 1929).

FLORIDA. See Florida Statutes Annotated (1952), Title XXX, Regulation of Professions and Vocations, Chapter 462, *Naturopathy*, Sections 462.01 through 462.21 (Law adopted in 1927).

GEORGIA. See Code of Georgia, Annotated (1937), Title 84, Professions, Businesses and Trades, Chapter 84-29, Naturopathists, Sections 84-2901 through 84-2917 (Law adopted in 1950).

HAWAII. Revised Code of Hawaii (1945), Title 6, Health, Chapter 50, Naturopathy, Sections 2651 through 2658) (Law adopted in 1925).

OREGON. See Oregon Complied Laws, Annotated (1940), Title 54, Healing Practitioners, Chapter 5, *Naturopaths*, Sections 54-501 through 54-502 (Law adopted in 1927).

SOUTH CAROLINA. See Code of Laws of South Carolina, Annotated (1952), Title 56, Professions and Occupations, Chapter 16, *Naturopathy*, Sections 56-901 through 56-919 (Law adopted in 1937).

TEXAS. Vernon's Civil Statutes of the State of Texas, Annotated (1951), Title 71, Health—Public, Chapter 17, Naturopathy, Article 4590-d. Sections 1 through 19 (Law adopted in 1949).

UTAH. Utah Code Annotated (1953), Title 58, Registration Department, Chapter 12, Practice of Medicine and Surgery and the Treatment of Human Ailments, Section 58-12-22 (Law adopted in 1939).

VIRGINIA. Code of Virginia, Annotated (1950), Title 54, Professions and Occupations, Chapter 12, Medicine and other Healing Arts, Article 1, General Provisions, Sections 54-273, sub-section (7), and 54-274, 54-279, 54-280 and 54-282 (Law adopted in 1944).

Again we point out that the Missouri Supreme Court in the opinion herein pointed out that Missouri makes provision for persons desiring to practice medicine in certain limited fields or to engage in related professions such as chiropractors, dentists, nurses, optometrists, osteopaths and pharmacists (355 S.W.2d l.c. 957).

In the case of *Skinner* v. *State of Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, the Court said (l.c. 1113):

> "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S. Ct. 1064, 1070, 30 L. Ed. 220."

We submit there was no reasonable or rational basis for discriminating against appellant and other naturopaths; certainly not to the extent of suppressing naturopathy and prohibiting appellant and other doctors of naturopathy from practicing this system of healing.

The rule is well stated in the case of *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527, 79 S. Ct. 437, the Court said (l.c. 441):

> "[8-10] But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' F. S. Royster Guano Co. v. Commonwealth of Virginia, 253 U.S. 412, 415, 40 S. Ct. 560, 561, 64 L. Ed. 989; Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32, 37, 48 S. Ct. 423, 425, 72 L. Ed. 770; Airway Electric Appliance Corp. v. Day, 266 U.S. 71, 85, 45 S. Ct. 12, 15, 69 L. Ed. 169; Schlesinger v. State of Wisconsin, 270 U.S. 230, 240, 46 S. Ct. 260, 261, 70 L. Ed. 557; Ohio Oil Co. v. Conway, 281 U.S. 146, 160, 50 S. Ct. 310, 314, 74 L. Ed. 775."

In the case of *England* v. *Louisiana State Board of Medical Examiners*, 5 Cir., 259 F.2d 626, a declaratory judgment action was brought claiming that the State's requirements that as a prerequisite to practice their profession as chiropractors they must obtain a diploma from a college approved by the American Medical Association, and that knowledge of surgery and *materia medica* bore no reasonable relation to the practice of chiropractic. The trial judge dismissed the complaint for want of a substantial federal question warranting exercise of jurisdiction. The Court of Appeals reversed and remanded the case. The Court there said (l.c. 627):

"Under all of the cases, we think it is that the State cannot deny to any individual the right to exercise a *reasonable* choice in the method of treatment of his ills, nor the correlative right of practitioners to engage in the practice of a useful profession."

In the case of *England* v. *Louisiana State Board of Medical Exam.*, 5 Cir., 263 F.2d 661, in a *per curiam* opinion on motion for rehearing in the above case, the Court said (l.c. 673):

"[9] We have dwelled at length on the prior case law simply to determine if the law has evolved into allowing the State under its police authority substantially to outlaw an apparently useful and beneficent profession with no showing or proof otherwise, for only if that were possible could we affirm the district court. We determine that the State has no such authority.

Particularly in the field of medicine and the healing art is the State given very broad powers. But the authority to regulate is limited by some constitutional standard and that standard is defined and applied by the courts. The Supreme Court of the United States has said that a state may not regulate in this field, when the regulations

'* * * have no relation to such calling or profession * * *.' Dent v. West Virginia, 129 U.S. 114, 122, 9 S. Ct. 231, 233, 32 L. Ed. 623.

'* * * [have] no real or substantial relation to those objects * * *.' Jacobson v. Mass., 197 U.S. 11, 31, 25 S. Ct. 358, 363, 49 L. Ed. 643.

'* * * are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily * * *.' Watson v. Maryland, 218 U.S. 173, 178, 30 S. Ct. 644, 646, 54 L. Ed. 987.

'* * * are arbitrary or unreasonable attempts to exercise the authority vested in it [legislature] in

the public interest.' Graves v. Minnesota, 272 U.S. 425, 428, 47 S. Ct. 122, 123, 71 L. Ed. 331.

"• • • [have] no rational relation to that objective and therefore is beyond constitutional bounds.' Williamson v. Lee Optical Company, 348 U.S. 483, 491, 75 S. Ct. 461, 466, 99 L. Ed. 563.

Here, the allegations of the complaining chiropractors certainly place the *application* of the Louisiana Medical Practice Act *to chiropractors* squarely within the above prohibitions.

[10, 11] We give full recognition to the State's power to regulate, reasonably and rationally, all facets of the medical field, even to excluding certain professions or specialists or schools by subjecting them to the rigid requirements of medical doctors or by expressly outlawing them. But the State cannot outlaw an allegedly useful and lawful profession without a 'reasonable' or 'rational' basis for so doing."

This Court denied an application for a Writ of Certiorari from that case, which included both opinions, *Louisiana State Board of Medical Examiners, Petitioners, v. England*, 359 U.S. 1010, 79 S. Ct. 1149.

In the case of *Stuart v. Wilson*, 5 Cir., 293 F.2d 914, the Court held a similar case presented a substantial federal question calling for a hearing before a three-judge federal Court.

The opinion of the Missouri Supreme Court strongly relies upon the case of *Hitchcock v. Collenberg*, D.C., 140 F. Supp. 894; affirmed 353 U.S. 919, 77 S. Ct. 679, 1 L. Ed. 2d 718.

That was not a criminal prosecution but a civil suit for declaratory judgment.

The Court there quoted from a Maryland case as follows (140 F. Supp. l.c. 901):

"'Before a law of this kind can be declared violative of the 14th amendment as an unreasonable classification of the subjects of such legislation because of the omission of certain classes, the court must be able to say that there is "no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched".'"

We submit the situation here brings this case directly within the above reasoning and demonstrates the classification is arbitrary and unreasonable. Here there is no fair reason for this law which would not with equal force require its extension to medical doctors by requiring them to study naturopathy and qualify in that field of healing before being authorized to practice naturopathy. We submit the Hitchcock case overlooks this and in so doing is unsound and illogical.

The rulings in the England and Stuart decisions of the Fifth Circuit Court of Appeals, *supra*, demonstrate the Hitchcock case did not settle the issues here involved and that a decisive opinion of this Court is needed to put the matter at rest. This Court denied an application for a Writ of Certiorari in the England case. *Louisiana State Board of Medical Examiners, Petitioners, v. England*, 359 U.S. 1010, 79 S. Ct. 1149, which is some further indication of the unsettled and uncertain condition of the law on these issues.

CONCLUSION.

The issues here presented are serious and involve not only the Constitutional rights of Appellant but the health and welfare of many citizens of the United States who benefit from the treatment by the Naturopathic system of healing and desire to exercise their Constitutional rights under the First Amendment to the Constitution of the

United States to choose the system of treatment they wish for themselves. The time has come when these issues should be laid to rest by an authoritative opinion by this Court ending the present uncertainty and unsettled condition.

Because of the gravity of this situation which affects not only sacred private rights but the public health and welfare, it is respectfully submitted that this matter calls for plenary consideration with briefs on the merits and oral argument for its resolution.

Respectfully submitted,

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Of Counsel for Appellant:

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PROOF OF SERVICE.

I, Walter A. Raymond, one of the attorneys for Robert G. Errington, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served copies of the foregoing Notice of Appeal and the foregoing Jurisdictional Statement on the adverse party hereto as follows:

1. On the State of Missouri by mailing a copy of the Notice of Appeal herein in a duly addressed envelope, with regular postage prepaid, to Honorable Thomas F. Eagleton, Attorney General of the State of Missouri, Su-

preme Court Building, Jefferson City, Missouri, on the 21st day of May, 1962.

2. On the State of Missouri by mailing two copies of the foregoing printed jurisdictional Statement in a duly addressed envelope with regular postage prepaid to Honorable Thomas F. Eagleton, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri, on the 2nd day of June, 1962.

Walter Raymond

Attorney for Robert G. Errington, Appellant,
915 Grand Avenue,
Kansas City 6, Missouri.

APPENDIX.

Section 334.030, R.S. Mo., 1949, so far as material here, provides:

> **"334.030. Practice of medicine without license prohibited—forgery of license—penalties.**
>
> 1. Any person practicing medicine or surgery in this state, and any person attempting to treat the sick or others afflicted with bodily or mental infirmities, and any person representing or advertising himself by any means or through any medium whatsoever, or in any manner whatsoever, so as to indicate that he is authorized to or does practice medicine or surgery in this state, or that he is authorized to or does treat the sick or other afflicted with bodily or mental infirmities, without a license from the state board of medical examiners shall, upon conviction, be adjudged guilty of a misdemeanor for each and every offense; and treating each patient shall be regarded as a separate offense; provided, that physicians registered on or prior to March 1, 1901, shall be regarded for every purpose herein as licensees and registered physicians under the provisions of this law."

Section 334.120, R.S. Mo., 1949, provides:

> **"334.120. State board of medical examiners—members—qualifications—compensation—powers.**
>
> 1. There is hereby created and established a board to be known as 'The State Board of Medical Examiners' for the purpose of registering and licensing all practitioners of medicine, surgery, and midwifery in this state. The board shall consist of six members to be appointed by the governor by and with the advice and consent of the senate, all of whom shall be doctors

of medicine, duly registered and licensed under the laws of this state. Each member must have been a resident of this state for a period of at least five consecutive years next preceding his appointment, and shall have been engaged in the lawful and ethical practice of medicine. Three members so appointed shall be from the political party casting the highest number of votes at the next preceding general election and the other three members shall be from the political party casting the next highest number of votes at such election. The members of the board herein created shall be appointed as follows: Two members for a term of one year; two members for a term of two years; and two members for a term of three years; and thereafter all members shall be appointed for a term of four years; except that no two members shall be appointed whose terms shall expire simultaneously who are members of the same political party. Each member of the board shall receive ten dollars per day and expenses for the time actually employed in the discharge of his duties.

2. The board shall elect its own president, secretary, and treasurer, each to serve for a term of one year and shall maintain an office and employ an executive secretary who shall perform such duties as the board shall direct and who shall have the degree of bachelor of arts or its equivalent in college credits. The board shall meet annually and at such other times and places as a majority of the board shall designate, and shall keep a record of its proceedings and a register of all applicants for certificates. The records and the register shall be prima facie evidence of all matters recorded therein. Four members of the board shall constitute a quorum.

3. The board shall have a common seal; and shall formulate rules to govern its actions; its president and secretary shall have power to administer oaths. (L.1945 p. 1145 § 1, A.1949 H.B. 2073)"

"334.040. Examination—subjects to be passed—grade —recognition of certificates of other states.

1. All persons desiring to practice medicine or surgery in this state, or to treat the sick or afflicted, as provided in section 334.010, shall appear before the state board of medical examiners at such time and place as the board may direct and there shall be examined as to their fitness to engage in such practice.

2. All persons applying for examination shall make application in writing to the secretary of the board, at least thirty days before the date set for said examination by the state board of medical examiners. They shall furnish satisfactory evidence of their preliminary qualifications, to wit: A certificate of graduation from an accredited high school, or its equivalent, and satisfactory evidence of completion of premedical education consisting of a minimum of sixty semester hours of college credit in acceptable subjects from a reputable college or university approved by the board. They shall also furnish satisfactory evidence of having attended throughout at least four terms of thirty-two weeks of actual instruction in each term and of having received a diploma from some reputable medical college that enforces requirements of four terms of thirty-two weeks of actual instruction in each term, including two years' experience in operative and hospital work at time of graduation; provided, that the time of graduation has been since March 12, 1901, and two years' requirements if the date of the graduation is prior to March 12, 1901, and shall also furnish evidence of good moral character.

3. The medical examination except that part which is practical, to be in writing and the questions and answers shall be kept on file by the state board of medical examiners, subject to public inspection, and shall be of elementary and practical character, but sufficiently strict to test the qualifications of the

candidate as a practitioner, and shall embrace the subjects of anatomy, chemistry, physiology, thereapeutics, obstetrics, gynecology, surgery, practice of medicine, bacteriology, medical jurisprudence and hygiene; and such other branches as the state board may direct; provided, that each applicant for license shall have two hours if necessary during which to answer the usual number of questions asked on each branch examined upon.

4. The candidate shall be required to attain an average of seventy-five per cent of all subjects examined on, provided that he must not fall below fifty per cent on any one subject, before being granted a license; provided, however, that the examination of any applicant in therapeutics shall be conducted by the member or members of the said board who represent the system of medicine of which said applicant has been a student. If there shall be no representative of the school or system of which the applicant has been a student, the examination in therapeutics shall be conducted by an examiner appointed for that purpose by the governor of Missouri, but all examination other than that in therapeutics shall be conducted as heretofore provided in this chapter.

5. The state board of medical examiners shall issue to such persons as they shall find upon examination to possess the requisite qualifications, a license to practice medicine and surgery in accordance with the provisions of this chapter, and the state board of medical examiners shall not be permitted to favor any particular school or system of medicine but all applicants shall be subjected to the same examination and the same degree of proficiency shall be required of all; provided, that in determining the qualifications necessary for registration as a qualified physician the state board of medical examiners may, at its discretion, accept the certificate of the National Board of Medical Examiners of the United States, chartered under the laws of the District of Columbia, in lieu of

and as equivalent to its own professional examination. Every applicant for a license upon the basis of such certificate shall, upon making application showing necessary qualifications, as above set out, be required to pay the same fee required of applicants to take the examination before the board.

6. And it is further provided that the said state board of medical examiners may under the regulations established by the board admit without examination legally qualified practitioners of medicine who hold certificates to practice medicine in any state or territory of the United States or the District of Columbia with equal educational requirements to the state of Missouri and that extend like privileges to legally qualified practitioners from this state upon the applicant paying a fee of one hundred dollars." (R.S. 1939, § 9983, A.L.1941 p. 418, A.L.1945, p. 1147, A.L.—1951, p.—S.B.No.245, § 1).

Substitute Information in Lieu of Indictment.

STATE OF MISSOURI

vs.

ROBERT G. ERRINGTON.

In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1959. In Division Number 3 thereof, designated by the rules of said Court as Criminal Division B.

Now comes Loeb H. Granoff, Assistant Prosecuting Attorney for the State of Missouri, in and for the body of the County of Jackson, and upon his oath informs the Court, that Robert G. Errington whose Christian name in full is unknown to said Assistant Prosecuting Attorney, late of the county aforesaid, on the 29th day of May, 1959, at the County of Jackson, State of Missouri, did then and there unlawfully and wilfully attempt to treat one Ethel

Wales Strunk, who at that time was sick, and that the said Robert G. Errington practiced medicine without first being duly licensed by the Missouri State Board of Medical Examiners, against the peace and dignity of the State.

Loeb H. Granoff,
Assistant Prosecuting Attorney.

STATE OF MISSOURI,)
) ss.
COUNTY OF JACKSON,)

Loeb H. Granoff, Assistant Prosecuting Attorney in and for Jackson County, Missouri, makes oath and says that the facts set forth in the foregoing information are true, according to his best information and belief.

Loeb H. Granoff,
Assistant Prosecuting Attorney.

Subscribed and sworn to before me this 16th day of October, 1959.

John J. McFadden,
Clerk of the Circuit Court, Criminal Division, of Jackson County, Missouri.

(Seal) By Agnes Comer, Deputy.

Judgment of Conviction in Circuit Court.

Whereupon, the cause was taken under advisement by the Court.

THURSDAY, JUNE 2, 1960.

Now, on this day comes the Prosecuting Attorney, comes also the defendant, Robert G. Errington in person and by attorney, James L. McMullin, and the Court heretofore having heard the evidence, and having held the

cause under advisement, the Court now being fully advised in the premises, finds the defendant guilty as charged, and fixes said defendant's punishment at a sentence of one (1) year in the Jackson County jail, and in addition thereto at a fine in the sum of One Thousand ($1,000.00) Dollars.

Therefore, it is ordered and adjudged by the Court that said defendant, Robert G. Errington do undergo confinement in the Jackson County Jail for a period of one (1) year for said offense of practicing medicine without a license; and that the State of Missouri do have and recover of and from said defendant all costs herein, and that execution issue therefor, and it is further ordered by the Court that said defendant be remanded to the custody of the Sheriff of Jackson County, Missouri, and that said sheriff shall deliver said defendant to the custody of the proper officer in charge of said Jackson County jail, therein to be confined as aforesaid.

Wherefore, it is ordered and adjudged by the Court that the State of Missouri do have and recover of and from said defendant the sum of One Thousand ($1,000.00) Dollars as a fine as well as all costs herein, and that execution issue therefor, with commitment to the Jackson County jail attached thereto.

Now the Court fixes the appeal bond in the sum of Two Thousand ($2,000.00) Dollars, and said defendant is given ten (10) days in which to file Notice of Appeal.

Now on this day the Court on its own motion, and on motion of James L. McMullin, attorney for said defendant, sets aside the allocution and sentence heretofore had herein.

Special Affidavit of qualifications of the Summit Fidelity and Surety Company of Akron, Ohio, by Owen L. Larson, 13508 Spring, Grandview, Missouri, attorney in

fact, in the case of the State of Missouri, vs. Robert G. Errington, is filed and approved by the Court.

Now, on this day comes the Prosecuting Attorney, comes also the defendant, Robert G. Errington in person and by attorney, James L. McMullin, and said cause, heretofore having been heard by the Court and taken under advisement, now the Court being fully advised in the premises, finds the defendant guilty of practicing medicine without a license, and fixes the punishment at a sentence of one (1) year in the Jackson County Jail, and in addition thereto at a fine in the sum of one Thousand ($1000.00) Dollars.

Now the Court sets bond in the sum of Two Thousand ($2,000.00) Dollars, pending the filing of a Motion for a new Trial.

IN THE SUPREME COURT OF MISSOURI
EN BANC.

STATE OF MISSOURI,
Respondent,
v.
Robert G. Errington,
Appellant.
No. 48,352.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY.
HONORABLE DUVAUL P. STROTHER, JUDGE.

Robert G. Errington was found guilty (in a jury waived case) of practicing medicine without a license in violation of Sec. 334.030 R.S. Mo. 1949 (now repealed), a misdemeanor, and he was sentenced to confinement in the county jail for one year and a fine of $1,000. He has appealed from the ensuing judgment and asserts among other things that the above *statute is unconstitutional.* Jurisdiction of the appeal is in this court.

The substitute information on which appellant was tried charged that "on the 29th day of May, 1959, * * * (he) did then and there unlawfully and wilfully attempt to treat one Ethel Wales Strunk, who at that time was sick, and that the said Robert G. Errington practiced medicine without being duly licensed by the Missouri State Board of Medical Examiners, * * *." Sec. 334.030 upon which the information was based, was repealed effective August 29, 1959, and the substance thereof was reenacted as Secs. 334.010 and 334.250, R.S. Mo. 1959, V.A.M.S., cumulative supplement. The substitute information was filed October 16, 1959. The institution of the action subsequent to the repeal of the statute for a violation alleged to have occurred before its repeal is specifically authorized by Sec. 1.160, R.S. Mo. 1959, V.A.M.S. Reference hereafter to statutes, unless other-

wise stated, will be to them as they existed at the time of the alleged offense although a substantial change was made to Chapter 334 effective August 29, 1959.

Appellant maintained an office at 100 East 63rd Street, Kansas City, Missouri. He was listed in the "yellow pages" of the Kansas City *telephone directory* as follows: "Conservatory of Health, Dr. Robert G. Errington, *Naturopathic Physician*, Jackson 3-9201." On May 26, 1959, Ethel Wales Strunk called in person at appellant's office because, as she said, her condition was "run down". After appellant talked to her he told her that "it sounded like" she was "anemic and run down," that there was "probably something else wrong, perhaps gallstones," that he had a series of 18 treatments which "would get rid of them" and that the cost would be "$178.00 plus vitamins." Miss Strunk gave appellant a check for "the down payment" in the amount of $50.00 and was told to return on the following Friday morning, May 29, to receive a "dose of medicine". At that time appellant and his wife, referred to as his nurse, gave Miss Strunk "a glass full of medicine" which was "sort of pinkish-white." Miss Strunk testified that appellant said it was "a mild laxative" to "clean me out before they gave me the other dose of medicine." That evening, after she arrived home, she was "sort of sick" at her stomach and she felt as though she had taken "quite a laxative." By pre-arrangement appellant's nurse went home with Miss Strunk, and the nurse gave her "a glass of sort of yellowish, oily substance to drink." About midnight she became "real sick" and vomited a "greenish substance." She was too sick to go to work on the following Monday and Tuesday. On June 2, 1959, she returned to appellant's office. She was placed on a "sort of vibration table," was given "hot and cold baths in a big tub," and

was placed in front of a series of sun lamps. Appellant then came in and gave her an "adjustment." He "popped (her) neck and back," which was "supposed to help • • • circulation." Miss Strunk testified that at this time appellant "assumed" that she had gotten rid of the gallstones by reason of the previous treatment.

Miss Strunk asked appellant if he "studied to get his degree like most other licensed physicians do," and he replied that he did and that he was a licensed doctor. She and appellant then discussed "vitamins (she) would have to have." Appellant gave her "calcium powder" out of a gallon can for which she paid him $10.50. On June 9 she returned to appellant's office and "went through the series of treatments of the hot and cold baths and the adjustment again." At this time appellant gave her four bottles of vitamins, "it was A, C, D and E," which he said would "help build (her) up," but at the time her condition "had gotten worse." For these vitamins Miss Strunk paid appellant $44.60.

On June 16 and again on June 23 Miss Strunk received another "series of treatments." On June 16 appellant gave her another bottle of vitamins, "B-Complex, he called them" for which she paid $12.20. By this time Miss Strunk "was wondering about him" and also about the price of the vitamins. He "mentioned he had to have a special license to administer vitamins in less than 100, because the bottles were sealed," but the bottle he had given Miss Strunk had not been sealed. She discussed this with him but he "really didn't have an explanation for the fact the bottles weren't sealed."

Miss Strunk received no further treatments from appellant, but she returned on July 1, 1959, to have him fill out an insurance form. Appellant filled in the answers on

a "physician's Statement." In answer to the question "Your diagnosis," he wrote in the word "Choledochitis." He also made check marks to show that her condition was due to illness and not an accident and that the illness was a "primary condition." He wrote the word "Indigestion" in answer to the question, "What other disease is it secondary to, complicated with, or a sequence of." In answer to the question, "Dates you treated patient for this condition" he wrote "May 26" for treatment "at office," and he wrote "May 27-28-29-30, June 1-2-3-16, 23-30" for treatments "at home." He made a check mark indication that the "patient (had no) chronic or constitutional disease, physical defect or deformity." The form had a place for signature as follows: *"Signed* ..... M.D." Here appellant wrote "Dr. Robert G. Errington," and without marking out the printed letters "M.D." *he wrote over them what appears to be "N.D."*

There is no contention that appellant was or has been licensed by this State to engage in the practice of medicine or any of the healing arts, and it affirmatively appears that he was not licensed by the board of medical examiners referred to in Sec. 334.020. In the latter part of 1958 appellant was enjoined by this court from the practice of medicine on the basis that *he was not licensed by this State to practice medicine and that such unlicensed practice constituted a continuing public nuisance detrimental to the public health and contrary to and against the public policy of this State.* See *State* v. *Errington*, Mo. Sup., 317 S.W.2d 326, certiorari denied 359 U.S. 992, 79 S. Ct. 1122, 3 L. Ed. 2d 980.

Appellant asserts that Sec. 334.030 does not define the term "practice of medicine" and for this reason does not proscribe any activity as a crime.

"*'It is, of course, true that the defendant in a criminal cause has a constitutional right to demand the nature and cause of the accusation against him, and a criminal statute must be sufficiently clear that there can be no doubt as to when such statute is being violated.'*" *State* v. *King*, Mo. Sup., 303 S.W.2d 930, 935. In *Jordan* v. *De George*, 341 U.S. 223, 71 S. Ct. 703, 95 L. Ed. 886, it was stated that "The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct." In that case it was further ruled that "difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. *United States* v. *Wurzbach*, 1930, 280 U.S. 396, 399, 50 S. Ct. 167, 168, 74 L. Ed. 508. Impossible standards of specificity are not required. *United States* v. *Petrillo*, 1947, 332 U.S. 1, 67 S. Ct. 1538, 91 L. Ed. 1877. The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." See also *Berger* v. *United States*, 200 F.2d 818. The certainty required may be accomplished by the use of words or terms of common understanding and settled meaning. 22 C.J.S., Criminal Law, Sec. 24, p. 73; 14 Am. Jur., Criminal Law, Sec. 19; *Star Square Auto Supply Co.* v. *Gerk*, 325 Mo. 968, 30 S.W. 2d 447; *People* v. *Ring*, 26 Cal. App. 2d Supp. 768, 70 P.2d 281 (statute made it a misdemeanor for one not a member of the bar to "practice law"); *Goldstine* v. *State*, 234 Ind. 388, 126 N.E.2d 581; *State* v. *Bobbins*, 35 N.J. Super. 494, 144 A.2d 474; Annotation, 96 L. Ed. 374, 378. Conduct proscribed by Sec. 334.030 included the "*practice of medicine*," a *term of common understanding and meaning* and universally accepted to include, although not necessarily limited to, the acts of one publicly representing himself to be trained in the treatment and cure of ills of the human

body and purporting for a fee to diagnose bodily ills and effectuate a cure or an alleviation thereof. See *State* v. *Smith*, 233 Mo. 242, 135 S.W. 465, 33 L.R.A. (N.S.) 179; *State* v. *Davis*, 194 Mo. 485, 92 S.W. 484, 4 L.R.A. (N.S.) 1023; *State ex rel. Collett* v. *Errington, supra; State ex rel. Collett* v. *Scopel*, Mo. Sup., 316 S.W.2d 515; 41 Am. Jur., Physicians and Surgeons, Sec. 24; 70 C.J.S., Physicians and Surgeons, Sec. 10. The information fully advised appellant of *the acts contended by the State to constitute the practice of medicine*. The evidence established that the conduct of appellant *did constitute the practice of medicine* in the generally accepted and understood meaning of that term which Sec. 334.030 proscribed and declared to constitute a misdemeanor unless done by one duly licensed as provided by law or excused from obtaining a license. We find no merit to appellant's contention that Sec. 334.030 *was invalid for the reason that the term "practice of medicine"* was not given a legislative definition.

Appellant next contends that what he did in the treatment of Miss Strunk consisted only of "acts the Legislature of Missouri has by statute permitted osteopaths to prescribe and perform and has specifically declared the same to be not the '*practice of medicine.*'" Prior to August 29, 1959, Sec. 337.010, R.S. Mo. 1949, V.A.M.S., provided that "The system, method or science of treating diseases of the human body, commonly known as osteopathy, * * * is hereby declared not to be the practice of medicine and surgery within the meaning of Sections 334.010 to 334.180 and not subject to the provisions of said chapter." In *Atkinson* v. *American School of Osteopathy*, 240 Mo. 338, 144 S.W. 816, 821, this court said: "It is true that section 8537 (R.S. Mo. 1899) provides that osteopathy is '*not to be the practice of medicine* and surgery within the meaning of article 1 of this chapter (entitled Medicine and Surgery).

and not subject to the provisions of said article;' *but the purpose so expressed is simply to segregate this particular system from those for the regulation of which article 1 was enacted.*" In *Stribling v. Jolley*, Mo. App., 253 S.W. 2d 519, it was held that osteopathic physicians were *practitioners of a school of medicine within the meaning* of Sec. 205.300, R.S. Mo. 1959, V.A.M.S., which provides that in the management of a county hospital by the trustees thereof "no discrimination shall be made against practitioners of any school of medicine recognized by the laws of Missouri." It thus appears that osteopathic physicians do in fact practice medicine, but prior to August 29, 1959, this state segregated the particular system known as osteopathy and provided certain regulations in Chapter 337 applicable alone to that system, and it also provided that the authorized practice of osteopathy did not constitute the practice of medicine for the purpose of regulation pursuant to the provisions of Chapter 334. This, of course, did not mean that acts constituting the practice of medicine and authorized by Chapter 337 to be performed by a licensed osteopathic physician did not constitute the practice of medicine when performed by an unlicensed person. It meant only that one licensed as an osteopathic physician could perform those acts without being in violation of Chapter 334. There is no contention that appellant was or ever has been licensed by this State to practice osteopathy or any other branch of the healing arts. *Therefore, the commission by him* of acts constituting the practice of medicine *constituted a violation* of Sec. 334.030.

Appellant next contends that he is a naturopath; that the practice of naturopathy is a "recognized occupation" which is not prohibited or expressly regulated by this State; and that to require appellant to be a licensed physician in order to practice naturopathy denies him the right to

follow such occupation in violation of the Fourteenth Amendment to the Constitution of the United States.

In the frequently cited case of *Dent v. West Virginia*, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623, it was stated that "*It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition.*" That case involved the validity of a statute which required every person practicing medicine to obtain a certificate or license from the state board of health. The United States Supreme Court went on to say that although the interest of one to continue a profession is often of great value and cannot arbitrarily be taken from him, "there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely. * * *. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. *It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful voca-*

tion." See also *Williams* v. *Arkansas*, 217 U.S. 79, 30 S. Ct. 493, 54 L. Ed. 673; *Watson* v. *Maryland*, 218 U.S. 173, 30 S. Ct. 644, 54 L. Ed. 987; *Hawker* v. *People of State of New York*, 170 U.S. 189, 18 S. Ct. 573, 42 L. Ed. 1002; *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S. Ct. 570, 79 L. Ed. 1086. In the exercise of its right and authority to regulate for the public safety and welfare the Legislature of this State determined it to be proper and in the public interest to require all persons desiring to practice medicine to obtain a license therefor after complying with certain requirements, and by Sec. 334.030 it was made a misdemeanor for anyone to practice medicine without such license if not exempt from this requirement by reason of another statute. The Legislature has recognized and made provision for persons desiring to practice medicine in certain limited fields or to engage in related professions such as chiropodists (Chapter 330), chiropractors (Chapter 331), dentists (Chapter 332), nurses (Chapter 335), optometrists (Chapter 336), osteopaths (Chapter 337, now repealed), and pharmacists (Chapter 338). *The Legislature has not deemed it appropriate or in the public interest to make special provision for the regulation and licensing of persons to engage in the practice of naturopathy.* However, a state is not necessarily required to recognize or make special provision for every special field or system of healing or therapy and provide for the licensing of the followers of each such school by requiring of them only such education or knowledge as that particular group of followers may think appropriate. *Louisiana State Bd. of Medical Examiners* v. *Fife*, 162 La. 681, 111 So. 58, 54 A.L.R. 594, affirmed 274 U.S. 720, 47 S. Ct. 590, 71 L. Ed. 1324; *Hitchcock* v. *Collenberg*, 140 F. Supp. 894, affirmed 353 U.S. 919, 77 S. Ct. 679, 1 L. Ed. 2d 718; *Schlicting* v. *Texas State Board of Medical Examiners*, Tex., 310 S.W.2d 557; *Hahn* v. *State*, Wyo., 322 P.2d 896;

State ex rel. Collett v. *Scopel*, Mo. Sup., 316 S.W.2d 515, 519. *As pointed out in the Scopel case, this State does not prohibit the practice of naturopathy*, but it has established certain requirements which must be met and satisfied by any person (not exempted by some statute) who undertakes the practice of medicine, and one so licensed to practice may, if he desires, apply the tenets and principles of naturopathy in his practice. *While a State cannot arbitrarily confine all healing to any one school or practice, State* v. *Biggs*, 133 N.C. 729, 46 S.E. 401, *distinctions may be made and schools and methods exempted from regulation or made subject to special regulation, so long as the distinctions are not arbitrary or unreasonable. Watson* v. *Maryland*, 218 U.S. 173, 30 S. Ct. 644, 54 L. Ed. 987; *Semler* v. *Oregon State Board of Dental Examiners, supra; Parks* v. *State*, 159 Ind. 211, 64 N.E. 862; *Hitchcock* v. *Collenberg, supra.*

Appellant offered no evidence (except reading into the record the provisions of certain Missouri statutes of which we take judicial notice), and therefore the record does not tend to reveal any basis whatever for ruling or even implying that the failure of this State *to make special provision for practitioners of naturopathy is arbitrary or unreasonable.* It is not even established that appellant is a naturopath (except that he advertised as such in a telephone directory) or that he is qualified to practice naturopathy. In fact, there is nothing in the record to indicate of what the practice of naturopathy consists; that is, whether its principles are limited to some particular method of practicing the art of healing or to some limited portion of the human body, or whether it is kindred to the principles and scope of treatment employed by an allopathic or homeopathic physician. Appellant quotes in his brief a dictionary definition of naturopathy as "A drugless system of therapy by use of forces such as air, light, water,

heat, massage, etc." Assuming this to be a reasonably accurate definition of the principles of naturopathy, the evidence clearly establishes that appellant did not limit his activity to drugless therapy; he administered drugs.

All the constitutional objections made by appellant were presented in *Hitchcock* v. *Collenberg, supra*, thoroughly discussed in that case, and correctly ruled adversely to appellant's contentions. That case was later affirmed without opinion by the United States Supreme Court (353 U.S. 919, 77 S. Ct. 679, 1 L. Ed. 2d 718).

The statute under which appellant was charged, Sec. 334.030, provides that violation thereof is a misdemeanor, but no punishment is prescribed. As previously noted, this statute was repealed before the judgment in this case was entered, but the offense of practicing medicine without a license was reenacted as Secs. 334.010 and 334.025, R.S. Mo. 1959, V.A.M.S., Sec. 1.160, provides that when a statutory provision creating an offense is repealed or amended "the trial and punishment" for such offense shall be had, in all respects, as if the provision had not been repealed or amended "except * * * that if the penalty or punishment for any offense be reduced or lessened by any alteration of the law creating the offense, such penalty or punishment shall be assessed according to the amendatory law." Sec. 334.010, as reenacted effective August 29, 1959, provides that it shall be unlawful for any person not a registered physician *within the meaning of the law* "to practice medicine", and Sec. 334.250, as reenacted, provides that any person "who violates Section 334.010 shall, upon conviction, be adjudged guilty of a misdemeanor for each and every offense," but no punishment is prescribed. Therefore, the "penalty or punishment" for the offense of practicing medicine without license was not "reduced or lessened by the alteration of the law creating the offense." Sec. 556.270 provides that when an offense is declared by statute to be a misde-

meanor, "and no punishment is prescribed by that or any other statute" the punishment may be imprisonment in a county jail not exceeding one year or a fine not exceeding one thousand dollars, or both. Apparently the punishment was administered pursuant to this statute. The Attorney General does not take the position that Sec. 556.270 does not prescribe the punishment, but he states that he feels "duty-bound" to invite the attention of the court to Sec. 564.320, which is as follows: "If any person shall carry on or transact any business or occupation without license therefor, when such license is required by any law of this state, he shall be deemed guilty of a misdemeanor, and when no other punishment is prescribed for such offense, be fined in any sum not exceeding one hundred dollars or be imprisoned in the county jail not exceeding three months, or both." This section creates an offense constituting a misdemeanor and prescribes the punishment therefor. It is general in its application and is broader than Sec. 334.030 (before its repeal) and broader in its application than Secs. 334.010 and 334.250 as reenacted. It creates a separate and distinct offense from that created by Sec. 334.030 (before its repeal) or by Secs. 334.010 and 334.250 (as reenacted) which are specific and limited in their application. Sec. 569.320 does not purport to prescribe the punishment for the offenses created by Sec. 334.030 (before its repeal) and it does not constitute the "other statute" referred to in Sec. 556.270. The punishment for the violation of the offense charged is prescribed by Sec. 556.270, and the punishment which was imposed, while constituting the maximum authorized, is within the limits therein set out.

We have examined the record and find no error in regard to the matters referred to in Supreme Court Rule 28.02 not required to be preserved by an assignment of error upon an appeal. The judgment is affirmed and the sentence pronounced shall be executed.

Alden A. Stockard, Commissioner.

Per Curiam: The foregoing opinion by Stockard, C., is adopted as the opinion of the Court, *En Banc*, all concur.

And Thereafter the following proceedings were had and entered of record in said cause on the 12th day of March, 1962, to-wit:

State of Missouri, Respondent,

48,352 vs.

Robert G. Errington, Appellant.

Now at this day come again the parties, aforesaid, by their respective attorneys, and the court here being sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended, and have execution therefor. It is further considered and adjudged by the court that the sentence pronounced against the said Robert G. Errington, appellant herein, by the said Circuit Court of Jackson County be in all things executed. (Opinion filed.)

And Thereafter the following proceedings were had and entered of record in this cause on the 27th day of March, 1962, to-wit:

State of Missouri, Respondent,

48,352 vs.

Robert G. Errington, Appellant.

Comes now the appellant, by attorney, and files herein a motion for a rehearing, with service, in the above entitled cause.

IN THE SUPREME COURT OF MISSOURI.
EN BANC.

STATE OF MISSOURI,
Plaintiff,
vs.
ROBERT G. ERRINGTON,
Defendant.
No. 48,352.

Motion for Rehearing Before the Court en Banc.

Comes now the defendant herein and respectfully moves the court for a rehearing before the court *en banc* for the following reasons:

1. That the court erred in adopting the opinion rendered by Division 2 of the Supreme Court for the reason that it failed to consider the federal question involved in that defendant was convicted in the Circuit Court of Jackson County, Missouri, under Section 334.030, R.S. Mo., 1949, known as the Medical Practice Act and said act is unconstitutional as to the practice of Naturopathy due to the generalization of the phrase "Practice of Medicine", in that said act violates defendant's rights under the fourteenth amendment to the United States Constitution in depriving the defendant of a property right—the right to practice a gainful occupation—without the due process of law. The right to follow a recognized occupation is a right protected by the constitutional rights of liberty in the fourteenth amendment. *State* v. *Laughton*, 120 S.W. 53. *State* v. *Caperton*, 207 S.W. 795. *Louisiana State Board of Medical Examiners* v. *Jerry R. England*, 259 Fed. Rep. 2d 626.

2. The court erred in its ruling in that the act is unconstitutional as to Naturopathy, in that it attempts to require all persons who practice any branch or philosophy of the healing arts to submit themselves to a board of medical doctors and pass examinations and tests required by them

and to have the skill, education and training necessary to obtain a license to practice medicine and surgery, in violation of the United States Constitution. *State* v. *Armstrong*, 225 Pac. 491. *People* v. *Love*, 131 N.E. 809.

3. The court erred in its decision in that under this act the defendant's rights under Articles I and X of the Constitution of Missouri, 1949; and the fourteenth amendment to the federal constitution were violated in that Naturopathy is a right and occupation recognized under the federal security act. *State* v. *Armstrong*, 225 Pac. 491. *State* v. *Fite*, 29 Idaho 463, 159 Pac. 1183.

4. The court erred in its opinion in that the medical practice act under which defendant was convicted is unconstitutional as to the practice of Naturopathy, one of the philosophies of the healing arts, in that the act is too sweeping, broad and all encompassing and discriminatory in that it purports to cover all branches, forms and philosophies of the healing arts under the general term of "practice of medicine" in 334.030, R.S. Mo., 1949, and grants exclusive rights and privileges to those persons only authorized under said statute in violation of Title 15, U.S.C., Commerce and Trade, Sections 1, 2, 4, 7, 9, 15, 21, 25 and 26, and Chapter 2, Federal Trade Commission, Section 44, and therefore becomes class legislation. *Railroad* v. *Jenkins*, 68 N.C. 505. *Louisiana* v. *England*, 259 Fed. Rep. 2d 626.

5. The court erred in holding the act under which defendant was convicted constitutional in that Section 334.030 is unconstitutional as to the practice of Naturopathy, one of the branches of the healing arts, in that it purports under the general term "medicine", which is not defined, to include all of the branches or philosophies of the medical arts. *Louisiana State Board of Medical Examiners, appellees*, v. *Jerry R. England, appellant*, No. 16920, U. S. Court of Appeals (September, 1959). *Algeyer* v. *Louisiana*, 165

U.S. 578. *Butchers Union Company* v. *Cress City Company*, 111 U.S. 746. *Leeper* v. *Texas*, 149 U.S. 463. *Caldwell* v. *Texas*, 137 U.S. 692.

6. The court erred in holding the practice of Naturopathy falls under Section 334.030, R.S. Mo., 1949, for the reason that the state cannot deny to an individual the right to exercise a reasonable choice and method of treatment of his ills, nor can it deny the correlative right of practitioner to engage or practice in a useful profession. *England* v. *Louisiana*, 259 Fed. Rep. 2d 626.

7. The court erred in holding that the practice or philosophy of Naturopathy falls under the general term "practice of medicine" for the reason that Naturopathy is not mentioned in Section 334.030, R.S. Mo., 1949, and said section being a penal section must be strictly construed. *State* v. *King*, 203 S.W.2d 930. *Jordan* v. *DeGeorge*, 351 U.S. 223, and Naturopathy has long been practiced and allowed under the Common Law and the Common Law can only be altered by statutory provision and for the further reason that the law does not recognize a monopoly of the English language and the phrase "practice of medicine" has become so well known and universally used by all branches and philosophies of the healing arts that to allow any one branch exclusive rights under Section 334.030, R.S. Mo., 1949, constitutes a monopoly to one branch and class legislation forbidden by the fourteenth amendment to the United States Constitution, *Caldwell* v. *Texas*, 137 U.S. 692.

8. The court erred in holding that Naturopathy is forbidden under Section 334.030, R.S. Mo., 1949, relating to the practice of medicine by the medical doctors for the reason that there are many methods of treating disease and the legislature is not authorized to select one branch

as the state system without violating the defendant's rights under the federal constitution, *State* v. *Biggs*, 133 N.C. 149:

> "Though there are many methods of treating disease, among which the Legislature is not authorized to select one as the state system, excluding all others, yet this act, if valid, would make it punishable by law to charge a fee for treatment of 'any disease, real or imaginary, mental or physical, by any method whatsoever,' unless the party has been admitted by a committee from one school of treatment upon examination of that system, thus denying mankind any relief from pain and suffering except at the hands of that particular school of medical thought. It may be, and probably is, the best system. But that is a matter which must be decided by those who seek and must pay for the relief—not by the M.D.s themselves nor by the courts. Judges are lawyers and are not competent to decide, except for themselves as individuals, which is the best system of treatment, and those practitioners, who eschew medicine and surgery may well object to leaving the question whether 'medicine and surgery' is the only permissible method of treatment to be decided by the practitioners of that method".

9. The court erred in holding that the system and practice of Naturopathy constitutes the practice of medicine as defined under Section 334.030, R.S. Mo., 1949, regulating medical doctors for the reason that both systems of healing are wholly separate and distinct and have no relation to each other and use different principles and methods of treatment and for the court to so hold deprives defendant of his constitutional right to pursue a lawful vocation guaranteed him under the fourteenth amendment of the federal constitution. *Kent* v. *West Virginia*, 129 U.S. 114. *Williams* v. *Arkansas*, 217 U.S. 79. *Watson* v. *Maryland*, 218 U.S. 113. *Hawker* v. *People of the State of New York*, 170 U.S. 189.

Wherefore, appellant prays the court to grant him a rehearing in this case.

James L. McMullin,
315 Lathrop Building
Kansas City, Missouri,
Victor 2-4548,
Attorney for Defendant.

And Thereafter the following proceedings were had and entered of record in this cause on the 9th day of April, 1962, to-wit:

State of Missouri, Respondent,

48,352 vs.

Robert G. Errington, Appellant.

Now at this day, the court having seen and fully considered the appellant's motion for a rehearing, doth order that said motion be, and the same is hereby overruled.

No. 48352.

IN THE SUPREME COURT OF THE STATE OF MISSOURI.
EN BANC.

STATE OF MISSOURI,
Respondent,

vs.

ROBERT G. ERRINGTON,
Appellant.

Notice of Appeal to the Supreme Court of the United States.

I. Notice is hereby given that Robert G. Errington, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of the State of Missouri, en Banc, it being the highest Court of the State of Missouri in which a decision could be had, overruling appellant's motion for a rehearing from the opinion and judgment of that Court entered on March 12, 1962, affirming the judgment of conviction of the Circuit Court of Jackson County, Missouri, at Kansas City.

This appeal is taken pursuant to Title 28, U.S.C.A., Section 1257 (2).

Appellant was convicted of the crime of practicing medicine without a license in violation of Section 334.030, R.S. Mo. 1949, a misdemeanor, and he was sentenced to confinement in the county jail for one year and a fine of $1,000.00, and is now enlarged on bail.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. A true copy of the typewritten transcript of the record on appeal filed in the Supreme Court of Missouri.

2. A true copy of the Opinion of Division No. Two of the Supreme Court of Missouri as adopted and promulgated by the Court, en Banc, as its opinion.

3. A true copy of the motion of appellant for a rehearing filed in Division No. Two of the Missouri Supreme Court.

4. True copies of all printed briefs filed by the parties in the Supreme Court of Missouri.

5. A true copy of appellant's motion for a rehearing filed in the Court, en Banc.

6. A true copy of all entries in the Clerk's records in connection with this appeal (including all orders entered and the judgment of the Court) from the Jackson County Circuit Court.

All to be included under the certificate of the Clerk in accordance with procedures in appeals from the Supreme Court of Missouri to the Supreme Court of the United States.

III. The following questions are presented by this appeal:

(1) Whether the Missouri State Criminal Statute, Section 334.030, R.S. Mo., 1949, under which defendant was convicted, in failing to define the term "practice of medicine" is not so vague and indefinite as to leave it in doubt and uncertainty when the statute is being violated and thereby rendering said statute void for vagueness and unconstitutional as depriving defendant of that due process of law guaranteed him by Section 1, of the Fourteenth amendment to the Constitution of the United States.

(2) Whether Section 334.030, R.S. Mo., 1949, in depriving defendant of his right to practice his profession as a doctor of naturopathy is not unconstitutional and void as being a state law abridging his privileges and immunities guaranteed under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(3) Whether Section 334.030, R.S. Mo., 1949, in depriving defendant and other doctors of naturopathy of the right to practice their profession is not unconstitutional and void as arbitrary, capricious and discriminatory in depriving them of their liberty, personal rights and property without due process of law and equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(4) Whether Section 334.030, R.S. Mo., 1949, in singling out defendant and other doctors, of naturopathy and denying them the right to practice the healing art in accordance with the teachings of their profession is not arbitrary, capricious, discriminatory, unconstitutional and void as denying them due process of law and equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(5) Whether or not Section 334.030, R.S. Mo., 1949, is not an invalid attempt to exercise the police power, and is arbitrary, unreasonable and discriminatory in that (1) it arbitrarily requires naturopaths to pass examinations in non-naturopathic subjects, (2) prohibits the practice of naturopathy without showing it to be detrimental to the public or inherently harmful, and (3) unfairly discriminates against naturopaths by conferring exclusive jurisdiction over them on their medical competitors, and thereby abridges their privileges and immunities, deprives them of their liberty, personal rights and property without due

process of law, and denies them the equal protection of the laws in violation of their rights guaranteed by Section 1, of the Fourteenth Amendment to the Constitution of the United States.

Walter A. Raymond,
915 Grand Avenue,
Kansas City 6, Missouri,
Attorney for Robert G
Errington Appellant.